STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP2316-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RICHARD J. SULLA,

Defendant-Appellant.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, REVERSING AND REMANDING THE ORDER DENYING A MOTION FOR PLEA WITHDRAWAL ENTERED IN JEFFERSON COUNTY CIRCUIT COURT, THE HONORABLE DAVID J. WAMBACH, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

This case is before the court on the State's petition for review of an adverse court of appeals' decision. The court of appeals reversed and remanded the circuit court's decision denying the postconviction motion of defendant-appellant Richard J. Sulla, seeking to withdraw his no-contest pleas to

armed burglary and burglary. The court of appeals held that Sulla's allegations that he did not understand the effect of the read-in charge of arson on his sentence were sufficient to entitle him to an evidentiary hearing. In its decision, the court of appeals affirmed the circuit court's denial of Sulla's claims of judicial bias, ineffective trial counsel and erroneous exercise of sentencing discretion.

The State petitioned for review on the issue of whether Sulla was entitled to an evidentiary hearing on his motion for plea withdrawal. This court granted review, ordering that the State "may not raise or argue issues not set forth in the petition for review unless otherwise ordered by the court," citing Wis. Stat. § (Rule) 809.62(6) (Pet-Ap. 101).[1] Accordingly, the State limits its brief to the issues presented in its petition for review and, unless ordered to do so, will not respond to the issues of judicial bias and sentence modification raised by Sulla in his response to the petition.[2]

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[1] Wis. § (Rule) 809.62(6) provides:

> The supreme court may grant the petition . . . upon such conditions as it considered appropriate . . . . If a petition is granted, the parties cannot raise or argue issues not set forth in the petition unless ordered otherwise by the supreme court. The supreme court may limit the issues to be considered on review.

[2] The State notes that as he is entitled to do, Sulla included in his response to the petition for review the issues of judicial bias and sentence modification that the court of appeals decided in the State's favor and that were not included as issues in the State's petition for review. *See* Wis. Stat. § (Rule) 809.62(3)(d),(e), (3m)(b). However, because the order granting the petition for review specifically limits the issues the parties may address to those set forth in the petition for review, the State believes that this court granted review on the condition that the parties not raise or argue the issues that Sulla included in his response to the State's petition.

On appeal to this court, the State asks that this court find that the court of appeals improperly extended *State v. Bentley*, 201 Wis. 2d 303, 548 N.W. 2d 50 (1996) to require an evidentiary hearing whenever a defendant alleges in a motion for plea withdrawal that he or she did not understand that a charge that was dismissed and read in as part of the plea would have a negative impact on his or her sentence. The State further asks this court to reverse the court of appeals' decision holding that the circuit court erroneously exercised its discretion when it found that, despite Sulla's affidavit claiming he did not understand the effect of a read-in charge of arson on his sentence, the record as a whole demonstrated that Sulla understood the plea. Finally, the State asserts that pursuant to this court's decisions in *State v. Straszkowski,* 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835, and *State v. Frey*, 2012 WI 99, 343 Wis. 2d 358, 817 N.W.2d 436 – holding that a defendant's agreement to a read-in charge as a part of a plea does not admit guilt but it does necessarily subject the defendant to the possibility of a higher sentence – Sulla's assertion that he did not understand that a read-in charge would negatively affect his sentence is inherently incredible as a matter of law.

STATEMENT OF ISSUES PRESENTED

1. Did the court of appeals improperly extend this court's holding in *Bentley*, 201 Wis. 2d 303, that "a defendant is entitled to an evidentiary hearing if the motion alleges facts that, if true, would entitle the defendant to relief" (*State v. Sulla*, No. 2013AP2316-CR, slip op. ¶ 7 (Ct. App. May 21, 2015); Pet-Ap. 105), by finding that Sulla's affidavit, asserting that he did not understand that by agreeing to the read-in charge of arson he was effectively admitting guilt and that the read-in charge would have a negative impact on his sentence, was sufficient as a matter of law to allege facts that require an evidentiary hearing on a postconviction motion for plea withdrawal?

Circuit Court: After a hearing and by decision dated September 27, 2013, the circuit court denied Sulla's request for an evidentiary hearing on his motion for plea withdrawal, finding that his allegations in his affidavit that he did not understand the effect of the read-in arson charge on his sentence were "insufficient even if accepted as true" to grant Sulla an evidentiary hearing (58:4, Pet-Ap. 141).

Court of Appeals: The court of appeals reversed the circuit court's decision and remanded for an evidentiary hearing, holding that under *Bentley*, 201 Wis. 2d 303, Sulla's affidavit, asserting that his attorney told him that "'agreeing to the read-in offense of arson was not admitting guilt and that it was just something the Court would "look at" at sentencing;'" that he did not understand that by agreeing to a read-in charge, "'he would effectively be considered to have committed the offense;'" and that if he "'had known [the read-in charge] was going to be considered as a negative [during his] sentencing [he] would not have entered the no-contest plea'" (Slip op. ¶¶ 2, 3; Pet-Ap. 104), sufficiently alleged facts which, if true, would entitle him to withdraw his plea on the basis that it was entered unknowingly (Slip op. ¶ 15; Pet-Ap. 107-08).

2. Did the court of appeals improperly reverse the circuit court's exercise of its discretion under *Bentley* when the circuit court determined that the record in its entirety – including the signed plea questionnaire, the plea colloquy and the sentencing memorandum outlining Sulla's criminal history— conclusively demonstrated that Sulla was not entitled to an evidentiary hearing on his motion for plea withdrawal based solely on his affidavit asserting that he did not understand the effect of the read-in offense on his sentence? The court of appeals erred in setting forth a per se rule that an affidavit asserting that a defendant did not understand the effect of a read-in charge requires a hearing and that the circuit court may not exercise its discretion to deny a hearing even

when the circuit court determines that the entire record demonstrates that the defendant understood the plea.

Circuit Court: In its decision denying Sulla's motion for plea withdrawal, the circuit court determined that the record as a whole – including the Modified Criminal Case Settlement, the Plea Questionnaire and Waiver of Rights and the plea hearing transcript – "clearly and conclusively demonstrate[s] that the court's colloquy with the defendant established that he knew that Judge Erwin would 'consider' . . . those offenses [the read-ins]" during sentencing (58:5-6; Pet-Ap. 142). The circuit court exercised its discretion to deny the plea-withdrawal motion, finding that "the record sufficiently refutes the allegations raised by defendant Sulla. Because the record conclusively demonstrates so, Mr. Sulla is not entitled to an evidentiary hearing, nor should he be allowed to withdraw his pleas on this basis" and therefore, the "motion for an evidentiary hearing or for plea withdrawal . . . is denied" (59:2, 4; Pet-Ap. 148, 150).

Court of Appeals: The court of appeals reversed the circuit court's exercise of its discretion under *Bentley*, thus creating a per se rule that an evidentiary hearing is required whenever a defendant makes a factual allegation that "is about something internal to the defendant, like her or his understanding or intent, or is based on events that would not normally be covered by the existing record" (Slip op. ¶ 20; Pet-Ap. 109-10). The court of appeals held that based on the affidavit setting forth Sulla's internal understanding or intent about the effect of the read-in charge on the sentence, it was not proper for the circuit court to speculate "about what decisions Sulla might have made about a plea or trial, without there being any testimony from Sulla that addressed those matters regarding his own internal goals and intent" (Slip op. ¶ 26; Pet-Ap. 111-12). The circuit court was therefore precluded from finding that the record as a whole conclusively demonstrated that Sulla's allegations of a lack of

understanding of the plea agreement did not warrant an evidentiary hearing.

3. By ignoring this court's precedent in *Straszkowski*, 310 Wis. 2d 259 and *Frey*, 343 Wis. 2d 358, that agreeing to a read-in charge as part of a plea agreement is not an admission of guilt and that a read-in charge necessarily exposes the defendant to a higher sentence and restitution, did the court of appeals commit a fundamental error of law by holding that the statements in Sulla's affidavit were sufficient to require a hearing on his motion for plea withdrawal? Pursuant to the holdings in *Straszkowski* and *Frey*, the statement allegedly made by Sulla's lawyer – that "'agreeing to the read-in offense of arson was not admitting guilt and that it was just something the Court would "look at" at sentencing'" – is legally accurate and as a matter of law could not provide a basis for plea withdrawal (Slip op. ¶ 3; Pet-Ap. 104). In addition, in accord with *Straszkowski* and *Frey*, Sulla's statement in his affidavit that he did not understand that the read-in charge would "be considered as a negative at [his] sentencing" is inherently incredible as a matter of law (Slip op. ¶ 3; Pet-Ap. 104).

Neither the circuit court or the court appeals addressed the applicability of *Straszkowski* and *Frey*.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in most cases accepted by the Wisconsin Supreme Court for review, oral argument and publication are both warranted.

STATEMENT OF THE CASE

Charges and Plea Agreement. Sulla was charged with two counts of burglary, one count of conspiracy to commit arson of a building, and one count of party to the crime of

operating a motor vehicle without the owner's consent, all as a repeater (1:1-7). He pled no-contest to burglary while armed and burglary of a building or dwelling, signing the Plea Questionnaire/Waiver of Rights form that included the understandings that "although the judge may consider read-in charges when imposing sentence, the maximum penalty will not be increased" and that Sulla "may be required to pay restitution on any read-in charges"(23). The Modified Criminal Case Settlement, signed by Sulla and his attorney, indicated that Sulla was pleading no contest to Count 1, burglary with a dangerous weapon as a repeater, and Count 3, burglary of a building or dwelling as a repeater; indicated that Count 2, conspiracy to commit arson of a building as a repeater and Count 4, operating a motor vehicle without consent as a repeater, were dismissed and read in; and imposed restitution in the amount of $462,070 (24).

At the plea hearing, the circuit court conducted the following colloquy with Sulla:

> THE COURT: Mr. Sulla, I understand that of the four counts made against you, you intend to withdraw your not guilty pleas and instead plead no contest to crimes in Counts 1 and 3 called armed burglary and burglary both as habitual criminals. Is that right?
>
> (Mr. Sulla speaking with Mr. De La Rosa off the record).
>
> MR. SULLA: Yes, ma'am.
>
> THE COURT: And then you expect that both sides will ask me to dismiss Counts 2 and 4, conspiracy to commit arson and operating a motor vehicle without owner's consent, again both as habitual criminal, but have me consider those offenses when I sentence you, also true?
>
> MR. SULLA: Yes, ma'am.

(65:2-3). The court recited the State's sentence recommendation for "consecutive prison sentences with some extended supervision" on both counts, no contact with the victims, and restitution on Count 1 (65:3). The circuit court then continued the colloquy with Sulla:

> THE COURT: So Mr. Sulla, have I correctly stated the representation that the State's attorney has made to you regarding the State's recommendations?
>
> MR. SULLA: Yes, ma'am.
>
> THE COURT: Have you had enough time with Mr. De La Rosa?
>
> MR. SULLA: Yes, ma'am.
>
> THE COURT: He's told you and you've – you understand from him that I don't have to follow that recommendation or your recommendation or anyone's recommendations in these cases, don't you?
>
> MR. SULLA: Yes, ma'am.
>
> THE COURT: In fact, on Count 1, I could order imprisonment up to 21 years and up to $50,000 in fines and on Count 3, I could order imprisonment up to 18 ½ years and up to $25,000 in fines, so regardless of the recommendations, my authority is to – for a total of 39 ½ years imprisonment and $75,000 in fines; do you understand my sentencing authority?
>
> MR. SULLA: Yes, ma'am.

(65:4). Sulla testified that he had signed and understood the Plea Questionnaire/Waiver of Rights form (65:4-5). After Sulla pled no contest to Counts 1 and 3, the court found that his pleas were "knowing, voluntary, and intelligent. They and the dismissed charges are sufficiently supported by fact" and accepted the pleas, finding that Sulla was a habitual criminal (65:10).

Sentencing. Prior to sentencing, the victims of the burglaries and arson submitted letters to the court describing the trauma they suffered as a result of these crimes (28). Further, the district attorney submitted a lengthy sentencing memorandum outlining the aggravating factors in these crimes, including Sulla's eighteen prior criminal convictions with all but one occurring in the last two years, for a total of fifteen felonies and ten burglaries, and the resulting need to protect the public from Sulla's criminal activities (29, Pet-Ap. 114-25).

At the sentencing hearing, the circuit court discussed Sulla's age at the time of the burglaries – twenty-two and twenty-three years old – and the fact that he had eighteen criminal convictions before these crimes (66:46). Further, the court described the aggravating factor that he committed these burglaries while on work release: he was "at that place, the jail, where [he] had only to say the word and there were professionals who would have assisted [him] in addressing drug abuse or addiction" (66:46-47). The court also addressed the nature of the crime of residential burglary, describing it as "a feeling of personal violence," which included as to Count 1 for armed robbery, the aggravating factor that he stole "a bunch of guns" (66:50).

The circuit court also specifically addressed the read-in count of arson:

> [Y]ou asked me to dismiss it and consider it as a read-in. So I'm going to. **I'm not going to consider that you are uninvolved with it.** You gave me a victim – **You gave me a plea questionnaire that says that you understand that if charges are read in as part of the plea agreement they have the following effect; at sentencing, the judge may consider read in charges when imposing sentence, but the maximum penalty will not be increased and that you might be required to pay restitution for read in charges** and that the State can't prosecute you separately for it in the future.

(66:50-51) (emphasis added). The court further stated, regarding the read-in arson charge and Sulla's statement that he was in Michigan at the time of the arson and thus claimed that he was "non-participatory in the torching altogether": "the arson followed the burglary that you were involved with. And so it followed that felony" (66:51).

Before imposing sentence, the circuit court stated the goals of the sentencing decision as "first and foremost public protection. Second, deterrence. . . . My third goal is to punish you. Other methods were tried. A lot of public effort was ordered. And you were nonetheless chronic in victimizing additional people" (66:52-53). The court also stated it hoped for rehabilitation and restitution for the victims (66:53). The court further explained that the impact of causing fear to the victims and the gravity of the crimes justified ordering consecutive sentences (66:53-54). By the circuit court's sentencing decision and the judgment of conviction, Sulla was sentenced to fifteen years on Count 1, armed burglary, with seven years and six months initial confinement and seven years and six months extended supervision, and five years on Count 3, burglary of a building or dwelling, with two years and six months initial confinement and two years and six months of extended supervision, to be served consecutively to each other and to any other sentence (33, Pet-Ap. 126-28; 39, Pet-Ap. 129-31; 66:54-55).

Postconviction Motion. Sulla filed a postconviction motion pursuant to Wis. Stat. § (Rule) 809.30, asking the court to vacate the judgment of conviction and to allow him to withdraw his no contest pleas and further alleging that he was entitled to sentence modification or a resentencing hearing because the court erroneously exercised its discretion (52). Sulla argued that his plea was not knowingly made and resulted in a "manifest injustice" because "he was misinformed and did not understand that for purposes of the read-in arson charge, he

would effectively be considered to have committed the offense," and that his trial counsel was ineffective (53:6-9).

After a hearing before the Honorable David Wambach and by written decision, the circuit court denied Sulla's request for an evidentiary hearing because "the record conclusively demonstrates and shows that his counsel was not deficient and that there was not any prejudice to the defendant" (58:1; Pet-Ap. 138). The circuit court made extensive findings of fact, including that Sulla had agreed to have the arson charge read in and that "[t]he read-in gave him the benefit of the bargain which was to avoid the significant prison exposure from the arson" (58:2, Pet-Ap. 139). The circuit court further noted that Sulla had signed the Modified Criminal Case Settlement that "clearly notes that the defendant would be responsible for restitution in the two amounts listed, which total $462,070.00" and that this "completely undercuts the claim that he did not know that the court would consider he committed the arson; otherwise how do you get to that amount of restitution without him being held responsible for the arson?" (58:5; Pet-Ap. 142).

The circuit court also found that Sulla had signed the Plea Questionnaire and Waiver of Rights form, which included the understanding that the court may consider read-in charges in imposing sentence (58:5-6; Pet-Ap. 142-43).

Significantly, the circuit court also found that the plea hearing transcript "clearly and conclusively demonstrate[s] that the court's colloquy with the defendant established that he knew that Judge Erwin would 'consider' . . . those offenses [the read-ins]" during sentencing (58:6, Pet-Ap. 143). The circuit court found that the plea hearing transcript "establish[es] that the defendant had gone through the Modified Criminal Case Settlement and the Guilty Plea Questionnaire, read them and understood what was in them and had enough time with his attorney in regard to both of those forms and their content"

(58:6-7; Pet-Ap. 143-44). The court therefore denied Sulla's postconviction motion, "based upon the entire record and file including the arguments and presentation of counsel and the reasoning and rationale set forth by the court and the pronouncements as to findings and conclusions made by the court[.]" (58:9, Pet-Ap. 146).

In a supplemental decision, the circuit court addressed further the issue of whether Sulla agreed to restitution, finding that "the record sufficiently refutes the allegations raised by defendant Sulla. Because the record conclusively demonstrates so, Mr. Sulla is not entitled to an evidentiary hearing, nor should he be allowed to withdraw his pleas on this basis" (59:2, Pet-Ap. 148). Therefore, the "motion for an evidentiary hearing or for plea withdrawal . . . is denied" (59:4, Pet-Ap. 150).

Court of Appeals Decision. Sulla appealed from the judgment of conviction and the orders denying the defendant's postconviction motion (61). The court of appeals reversed and remanded the case for an evidentiary hearing, holding that the circuit court erred in denying Sulla's postconviction motion for plea withdrawal without an evidentiary hearing. The court held that under *Bentley*, 201 Wis. 2d 303, Sulla had sufficiently alleged facts which, if true, would entitle him to withdraw his plea on the basis that it was entered unknowingly. The court of appeals based this determination on statements in Sulla's affidavit submitted with his postconviction motion, in which he asserted that his attorney told him that "'agreeing to the read-in offense of arson was not admitting guilt and that it was just something the Court would "look at" at sentencing;'" that he did not understand that by agreeing to a read-in charge, "'he would effectively be considered to have committed the offense;'" and that if he "'had known [the read-in charge] was going to be considered as a negative [during his] sentencing [he] would not have entered the no-contest plea'" (Slip op. ¶¶ 2, 3; Pet-Ap. 104).

Based solely on this affidavit, the court of appeals held that under *Bentley*, Sulla was entitled to a hearing because he had alleged non-conclusory facts that, if true, entitled him to relief: Sulla's statement in his affidavit that he did not "properly understand the read-in concept" was sufficient because "[i]t is not inherently implausible that a defendant would misunderstand the read-in concept" because the concept "creates a potential for confusion" (Slip op. ¶¶ 11, 12; Pet-Ap. 106-07). Further, the court of appeals found that the word "guilt" as used in Sulla's counsel's alleged statement was ambiguous and "given the potential for confusion that is inherent in the read-in concept, we conclude that Sulla has alleged facts that, if true, would entitle him to relief" (Slip op. ¶ 15; Pet-Ap. 107-08).

The court of appeals recognized that under *Bentley*, even if the defendant alleges such facts in the motion, the court has discretion to "deny a postconviction motion if the 'record conclusively demonstrates' that the defendant is not entitled to relief" (Slip op. ¶ 16; Pet-Ap. 108). However, the court defined the "scope of a court's ability to reject a postconviction motion's factual allegations on that basis" to mean that a record conclusively demonstrates the falsity of a defendant's factual allegations when, "even after hearing the expected testimony in support of the postconviction motion at an evidentiary hearing, no reasonable fact-finder could find in the defendant's favor, in light of the rest of the record" (Slip op. ¶¶ 16, 18, Pet-Ap. 108-09). Therefore, a hearing is "unnecessary when only one outcome is reasonably possible," but if the record is not sufficiently conclusive and the allegations are reasonably disputable "a hearing must be held, because normally a court cannot make findings on reasonably disputable facts by using solely a paper record" (Slip op. ¶ 18, Pet-Ap. 108-09).

While the court recognized that this was a "high standard" to meet to avoid an evidentiary hearing, especially when the defendant's "non-conclusory factual allegation is about something internal to the defendant, like her or his own understanding or intent, or is based on events that would not normally be covered by the existing record, it will often be more difficult to say that the record conclusively demonstrates the falsity of an allegation" (Slip op. ¶¶ 19, 20; Pet-Ap. 109-10).

In this case, the court of appeals held that the record did not conclusively demonstrate that Sulla understood the read-in concept, because the circuit court's analysis "exceeded the scope of what a court can properly consider when deciding" this issue:

> For example, in one passage the court speculated that Sulla "would presumably testify" in a particular way, and "at that point his credibility is impeached not only by the contrary record but by double digit prior criminal convictions without even considering his demeanor or what would be revealed through cross examination. What would be gained by an evidentiary hearing?" The court also made a credibility determination by weighing Sulla's allegation against portions of the existing record like the plea colloquy and plea questionnaire. These types of credibility judgments and speculation about expected testimony cannot substitute for an evidentiary hearing.

(Slip op. ¶ 22; Pet-Ap. 110-11).

The court of appeals held that even though Sulla did not explicitly say that if he had understood the effect of the read-in arson charge on his sentence, he would have gone to trial, "[i]t is not necessary for the defendant to allege with precision" whether he would have gone to trial or negotiated for a different offer (Slip op. ¶ 25; Pet-Ap. 111). Further, because it was not proper for the circuit court to speculate "about what decisions Sulla might have made about a plea or trial, without there being any testimony from Sulla that addressed those

matters regarding his own internal goals and intent" (Slip op. ¶ 26; Pet-Ap. 111-12), the court of appeals held that the record did not conclusively demonstrate that Sulla would still have pled no-contest.

ARGUMENT

I. THE COURT OF APPEALS' DECISION REMANDING FOR AN EVIDENTIARY HEARING SHOULD BE REVERSED BECAUSE REQUIRING AN EVIDENTIARY HEARING AS A MATTER OF LAW WHEN A DEFENDANT SUBMITS AN AFFIDAVIT STATING THAT HE OR SHE DID NOT UNDERSTAND THE EFFECT OF A READ-IN OFFENSE ON SENTENCING IS AN UNWARRANTED EXTENSION OF THIS COURT'S DECISION IN *BENTLEY*.

A. Relevant law and standard of review.

The only case that the court of appeals cites in support of its decision to remand for an evidentiary hearing is *Bentley*, 201 Wis. 2d 303, and *Bentley's* holding that "a defendant is entitled to an evidentiary hearing if the motion alleges facts that, if true, would entitle the defendant to relief. . . . [and that are] more than conclusory" unless "the 'record conclusively demonstrates' that the defendant is not entitled to relief" (Slip op. ¶¶ 7, 16; Pet-Ap. 105, 108). Applying *Bentley*, the court of appeals held that Sulla's affidavit stating that he did not understand the effect of a read-in offense – specifically, that it would be considered "as a negative" in his sentencing and that had he known, he would not have pled no-contest to the burglary charges – provided a sufficient factual allegation that his plea was unknowingly entered and thus he was entitled to an evidentiary hearing.

In *Bentley*, the defendant sought plea withdrawal on the basis that his counsel failed to accurately inform him of his parole eligibility date, and the circuit court denied his motion without a hearing. *Bentley*, 210 Wis. 2d at 307-08. This court found that "Bentley's motion on its face failed to allege facts which, if true, would entitle him to relief" and thus "the circuit court was not required to hold such a hearing. We further conclude that the circuit court's decision not to hold an evidentiary hearing constituted a proper exercise of discretion." *Id.* at 306.

In so holding, this court established the standard of appellate review applicable to the test set forth in *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), for determining whether a circuit court must hold a hearing on a motion to withdraw a guilty plea. In *Nelson*, this court stated that

> if a motion to withdraw a guilty plea after judgment and sentence alleges facts which, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. However, if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Id. at 497-98; *Bentley*, 201 Wis. 2d at 310. Applying *Nelson*, this court in *Bentley* outlined the two-part test on appellate review:

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. . . . Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo. . . .
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing based on any one of the three factors enumerated in *Nelson*. When reviewing a circuit

> court's discretionary act, this court uses the deferential erroneous exercise of discretion standard.

Bentley, 201 Wis. 2d at 310-11 (citations omitted).

Therefore, under *Nelson* and *Bentley*, in order to be entitled to an evidentiary hearing on a postconviction motion for plea withdrawal, the defendant has the initial burden to allege non-conclusory facts that, *if true*, would entitle the defendant to relief. *See Nelson*, 54 Wis. 2d at 497-98; *Bentley*, 201 Wis. 2d at 309-10. This court recognized that in determining whether a hearing is warranted, "[t]he nature and specificity of the required supporting facts will necessarily differ from case to case" and that the "defendant should provide facts that allow the reviewing court to meaningfully assess his or her claim." *Id.* at 313.

In *Bentley*, this court held that Bentley's "bare-bones allegation" that he would have pled differently if he had been correctly informed about the minimum parole eligibility date, without facts supporting this allegation, was "no more than a conclusory allegation and, under *Nelson*, not sufficient to require the trial court to direct that an evidentiary hearing be conducted." *Id*. at 316 (citation and quotation marks omitted). This court also warned against finding a defendant to "be entitled to an evidentiary hearing in every case that counsel made any mistake so long as a defendant makes a conclusory allegation that the mistake was prejudicial." *Id.* at 317. Because Bentley's allegation that he would not have pled guilty had he known his minimum parole eligibility date was conclusory and did not "allege facts which, if true, would entitle him to withdraw his plea, the circuit court was not required to hold a hearing on his motion under the first prong of *Nelson*." *Id.* at 318.

B. Under the first prong of *Bentley*, the circuit court properly determined that Sulla's affidavit did not allege sufficient, true facts that entitled him to an evidentiary hearing on his motion to withdraw his plea.

Under the first prong of *Nelson* and *Bentley*, this court reviews de novo the question of law of whether Sulla's motion for plea withdrawal "alleges facts which, if true, would entitle [Sulla] to relief." *Bentley*, 210 Wis. 2d at 310. In this case, such a review compels this court to reverse the court of appeals decision remanding for an evidentiary hearing.

By holding that Sulla was entitled to an evidentiary hearing based solely on the statements in his affidavit, the court of appeals impermissibly expands *Bentley* by requiring an evidentiary hearing on a postconviction motion for plea withdrawal where the factual allegations supporting the claim that the plea was not knowingly entered are "about something internal to the defendant" such as his or her understanding of the concept of a read-in charge (Slip op. ¶ 20; Pet-Ap. 109-10). Where, as here, the facts set forth in support of an evidentiary hearing are a defendant's subjective and "internal" misunderstanding of the effect of the read-in offenses on a sentence, the circuit court properly determined that as a matter of law, those facts are not "facts which, if true**,** would entitle the defendant to relief" in order for the court to order an evidentiary hearing. *Nelson*, 54 Wis. 2d at 497-98; *Bentley*, 210 Wis. 2d at 309-10.

In other words, under *Nelson* and *Bentley*, when determining whether an evidentiary hearing is required, the circuit court must determine not only whether there are sufficient non-conclusory facts, but also whether those facts are true. Here, the circuit court determined that Sulla's affidavit, asserting that he did not understand that read-in offenses

would have a negative impact on sentencing, did not entitle him to an evidentiary hearing both because the facts he alleged were not *true* and because the record as a whole demonstrated that he was not entitled to a hearing.

In his affidavit submitted with his postconviction motion for plea withdrawal, Sulla alleges that his trial attorney, Attorney De La Rosa, told him "that agreeing to the read-in offense of arson was not admitting guilt and that it was just something the court would 'look at' at sentencing" and that if he "had known that it was going to be considered as negative at [his] sentencing" he would not have entered the plea (50:1, Pet-Ap. 132). In its decision denying Sulla's motion, the circuit court found that these statements in Sulla's affidavit and his pleadings in support of his plea withdrawal motion were "insufficient even if accepted as true" (58:4, Pet-Ap. 141). Further, the circuit court found that Sulla's affidavit could not provide the basis for an evidentiary hearing on Sulla's plea withdrawal motion because Attorney De La Rosa's statement was an "accurate statement[ ] of the law" and therefore, Sulla's claim that his attorney misinformed him about the effect of the read-in offense – that it was "not admitting guilt" and "something the court would 'look at' at sentencing" – was not true (50:1, Pet-Ap. 132; 58:8, Pet-Ap. 145).

The court of appeals erred as a matter of law in holding that Sulla's affidavit claiming that he believed that a read-in offense would not have a negative effect on sentencing provided sufficient facts for an evidentiary hearing under *Bentley.* No one could sensibly believe – and courts must not allow a doctrine to take root – that a sentencing court's consideration of other bad acts (such as a read-in offense) could operate as anything other than a negative factor. *See Frey*, 343 Wis. 2d 358, ¶¶ 72-73 (by agreeing to a read-in offense and in exchange for the benefit of the prosecutor's agreement not to prosecute the read-in charge, "the defendant exposes himself to

the likelihood of a higher sentence within the sentencing range and the additional possibility of restitution for the offenses that are 'read-in'").

The court of appeals misapplied *Bentley* when the court held that Sulla's affidavit, asserting that he did not understand that read-in offenses would have a negative impact on his sentence, sufficiently alleged non-conclusory and true facts requiring a hearing on a postconviction motion for plea withdrawal. The court's decision fundamentally misinterprets *Nelson* and *Bentley* to require an evidentiary hearing any time a defendant's affidavit alleges a subjective and "internal" misunderstanding of the effect of a read-in offense on sentencing, even where the court determines that the facts alleged are not true and inherently incredible. This court should reverse the court of appeals' decision ordering an evidentiary hearing based on the allegations in Sulla's affidavit.

II. BY HOLDING THAT THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION TO DENY A HEARING AND THAT AN EVIDENTIARY HEARING IS REQUIRED BASED ON SULLA'S AFFIDAVIT STATING THAT HE DID NOT UNDERSTAND THE EFFECT OF A READ-IN OFFENSE, THE COURT OF APPEALS DECISION IMPROPERLY APPLIED THE SECOND PRONG OF *BENTLEY*.

As set forth in part I, this court should conclude that as a matter of law, Sulla's motion failed to allege sufficient true facts with his untrue allegations that he did not understand that the read-in charge of arson would negatively affect his sentence. Under the second prong of *Bentley*, because Sulla's motion failed to allege sufficient facts in support of plea withdrawal, this court reviews the circuit court's exercise of "discretion to deny his postconviction motion without a hearing based on any

one of the three factors enumerated in *Nelson*," including that the record conclusively demonstrated that Sulla was not entitled to relief. *Bentley*, 201 Wis. 2d at 310-11; *Nelson* 54 Wis. 2d at 497-98.

A. Relevant law and standard of review.

In *Bentley*, this court clearly set out first, the scope of the circuit court's proper exercise of its discretion to deny a postconviction motion without a hearing where the circuit court has determined that the record conclusively demonstrates that the defendant is not entitled to relief, and second, the standard of review of such a determination.

> Our review over this discretionary determination is limited to whether the court erroneously exercised its discretion in making this determination.
>
> A circuit court properly exercises its discretion when it has examined the relevant facts, applied the proper legal standards, and engaged in a rational decision-making process. *Schultz v. Darlington Mut. Ins. Co.*, 181 Wis. 2d 646, 656, 511 N.W.2d 879 (1994). More specifically, when deciding a motion for plea withdrawal without a hearing, "[i]t is incumbent upon the trial court to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." *Nelson*, 54 Wis. 2d at 598, 195 N.W. 2d 629.
>
> The circuit court examined the extensive plea colloquy and the guilty plea questionnaire signed by Bentley. It found that Bentley understood that any parole eligibility date was uncertain and that the court was free to set whatever parole eligibility date it felt appropriate. The court concluded that even if trial counsel had represented to Bentley that his minimum parole eligibility date would be 11 years, 5 months, the record unequivocally overrides that assertion. Applying the *Nelson* test, it denied the motion without a hearing because the record conclusively demonstrated that Bentley was not entitled to relief.

> The court's written decision demonstrates that it examined the relevant facts from the record, applied the properly legal standard, and engaged in a rational decision-making process to reach its conclusion. Accordingly, we conclude that the circuit court did not erroneously exercise its discretion in denying the motion without a hearing.

Bentley, 201 Wis. 2d at 318-19.

B. In its decision, the circuit court correctly found that Sulla's claim that he did not understand the read-in concept and therefore that his plea was not entered knowingly was refuted conclusively by the entire record.

In its written decision denying Sulla's postconviction motion for plea withdrawal without a hearing, the circuit court specifically noted the facts that Sulla had signed the Modified Criminal Case Settlement and the Plea Questionnaire and Waiver of Rights form (that included the understanding that the judge may consider read-in charges), and that the plea hearing transcript "clearly and conclusively demonstrate[s] that the court's colloquy with the defendant established that he knew that Judge Erwin would 'consider' . . . those offenses [the read-ins]" during sentencing (58:5-6, Pet-Ap. 142-43).

The circuit court also based its finding that Sulla understood that the read-in offenses would negatively affect his sentence on the fact that Sulla "had gone through the Criminal Case Settlement and the Guilty Plea Questionnaire, read them and understood what was in them and had enough time with his attorney," and that "the plea colloquy demonstrated that [Sulla] knew how the sentencing court could consider his conduct in the arson in deciding the appropriate sentence for counts one and three" (58:6-7, Pet-Ap. 143-44). The circuit court also cited Sulla's "double digit prior criminal convictions" as undermining his claim that he did not understand the effect of a read-in offense on his sentence;

specifically, Sulla had previously been criminally convicted eighteen times, including fifteen felonies and ten burglaries, with all but one occurring in the last two years (29, Pet-Ap. 114-25; 58:7, Pet-Ap. 144). Significantly, his numerous prior convictions included at least eighteen charges that were dismissed and read in (29:3-4. Pet-Ap. 116-17).

At the plea hearing, Sulla testified that he had signed and understood the Plea Questionnaire/Waiver of Rights form, which included the statements that the court "may consider read-in charges when imposing sentence" and that Sulla "may be required to pay restitution on any read-in charges"(23; 65:4-5). During the plea colloquy, the circuit court clearly informed Sulla that the read-in charge of arson would be considered at sentencing (65:3). At sentencing, the circuit court stated that it was "not going to consider that [Sulla was] uninvolved with" the arson and that Sulla had signed "a plea questionnaire that says that you understand that if charges are read in as part of the plea agreement they have the following effect; at sentencing, the judge may consider read in charges when imposing sentence, but the maximum penalty will not be increased and that you might be required to pay restitution for read in charges and that the State can't prosecute you separately for it in the future." (66:50-51). Further, the circuit court specifically pointed out to Sulla that "the arson followed the burglary that you were involved with. And so it followed that felony" (66:51).

Therefore, in denying Sulla's postconviction motion to withdraw his plea as unknowingly entered, the circuit court properly exercised its discretion under *Bentley* to find that the entire record demonstrated that Sulla understood the read-in concept and that he was not entitled to an evidentiary hearing on his claim, based on his affidavit asserting that his plea was unknowingly entered because he did not understand the effect of the read-in charge on his sentence (58:1, Pet-Ap. 138; 59:3-4,

Pet-Ap. 149-50). The circuit court specifically found that Sulla's claim that he did not understand the effect of the read-in charge on his sentencing was not credible because the record as a whole, including the Criminal Case Settlement, Plea Questionnaire and the plea colloquy, demonstrated that Sulla "understood what he was doing" in entering the plea that included the read-in offense of arson that would be considered at his sentencing (58:8-9, Pet-Ap. 145-46)

Yet the court of appeals reversed and remanded for a hearing, holding that the circuit court erroneously exercised its discretion in finding the record conclusively demonstrated that Sulla's affidavit was false (Slip op. ¶ 22; Pet-Ap. 110-11). The court of appeals improperly applied *Bentley* to this case and in so doing, has potentially opened the door to other defendants who will claim that *Bentley* does not allow the circuit court to exercise its discretion to deny a hearing where a defendant claims that, in his or her own mind, he or she did not understand that a read-in charge would have a negative effect on sentencing.

According to the court of appeals' decision:

> [i]f it is true that the defendant failed to understand the essential concept, it should not normally matter what the reason for that failure was. . . . [I]t makes no difference to the ultimate outcome whether it was a misstatement by counsel that caused the defendant's misunderstanding, or whether instead the misunderstanding arose from some other source, such as a misstatement by the court, incorrect information from a friend, or the defendant's own internal failure to comprehend otherwise correct information.

(Slip op. ¶ 10; Pet-Ap. 106). This overly broad concept of the type of facts in an affidavit that are sufficient to require a hearing is highlighted further by the court of appeals discussion of the "scope of a court's ability to reject a postconviction motion's factual allegations on [the] basis" that

the "'record conclusively demonstrates' that a defendant is not entitled to relief" (Slip op. ¶¶ 16, 17; Pet-Ap. 108). The court of appeals set forth an unworkable standard for when the record "'conclusively demonstrate[s]' the falsity of a defendant's factual allegations," holding that this can only be met "when, even after hearing the expected testimony in support of the postconviction motion at an evidentiary hearing, no reasonable fact-finder could find in the defendant's favor, in light of the rest of the record" (Slip op. ¶ 18; Pet-Ap. 108-09). Presumably, the defendant's "expected testimony" in this case refers to the statements in Sulla's affidavit alleging that he did not understand that the read-in arson charge would have a negative effect on his sentence.

The court of appeals acknowledged that requiring an evidentiary hearing based on a defendant's "expected testimony" set forth in an affidavit unless "no reasonable fact-finder could find in the defendant's favor in light of the rest of the record" is an extraordinarily high standard when, as here, "the defendant's non-conclusory factual allegation is about something internal to the defendant, like her or his own understanding or intent, or is based on events that would not normally be covered by the existing record" (Slip op. ¶ 20; Pet-Ap. 109-10). Under the court of appeals' decision, whenever a defendant submits an affidavit alleging that he or she did not understand the effect of a read-in charge on sentencing, the circuit court must hold an evidentiary hearing so that the defendant can testify about the claimed failure to understand the affect of a read-in charge on sentencing and "[o]nce the defendant testifies, other material in the existing record is entirely proper to consider in making a determination of the defendant's credibility" (Slip op. ¶ 20, Pet-Ap. 109-10).

Indeed, based on the court of appeals' decision, any time a defendant sets forth in an affidavit that in his or her own mind – whether based on something he or she heard from

someone (an attorney, a family member, a friend, a stranger, anyone who wandered nearby), or some other source (a dream, a Ouija board, tarot reading, voices in his or her head) – that he or she did not understand that a read-in offense would be considered as a negative in sentencing, the defendant will be entitled to an evidentiary hearing. This is not a workable standard and is not in keeping with the holding in *Bentley* that, after a thorough examination of the entire record, the circuit court may exercise its discretion to deny a postconviction motion for plea withdrawal without a hearing if the record conclusively demonstrates that the defendant is not entitled to relief. *Bentley*, 201 Wis. 2d at 318-19.

In this case, the court of appeals held that the circuit court did not properly exercise its discretion to find that the entire record conclusively demonstrates that Sulla's claimed misunderstanding in an affidavit about the effect of a read-in offense was incredible, and therefore he was not entitled to an evidentiary hearing on a plea withdrawal motion. This court should reverse the court of appeals' decision requiring an evidentiary hearing on Sulla's motion for plea withdrawal based on his bald assertions that he did not understand that a read-in charge would negatively affect his sentence, and instead should uphold the circuit court's exercise of its discretion to deny Sulla's motion without a hearing.

III. THE COURT OF APPEALS COMMITTED A FUNDAMENTAL ERROR OF LAW BY HOLDING THAT THE FACTS ALLEGED IN SULLA'S AFFIDAVIT REQUIRED AN EVIDENTIARY HEARING WHEN, AS A MATTER OF LAW UNDER SUPREME COURT PRECEDENT, THOSE FACTS COULD NOT PROVIDE A BASIS FOR PLEA WITHDRAWAL.

The court of appeals, in remanding this case for an evidentiary hearing, ignored this court's decisions in *Frey*, 343 Wis. 2d 358 and *Straszkowski*, 310 Wis. 2d 259, which explain the plea-bargaining process and, in particular, establish that a read-in offense does not admit guilt to the charge but that, by its nature, a read-in charge will negatively affect the sentence imposed and may subject the defendant to restitution. By ignoring this precedent, the court of appeals committed a fundamental error of law because the facts in Sulla's affidavit that the court of appeals invoked to justify its remand are facts that, under *Frey* and *Straszkowski*, preclude relief as a matter of law.

A. The holdings in *Straszkowski* and *Frey*.

In *Straszkowski,* the defendant pled guilty to three charges (sexual assault, possession of drug paraphernalia and passing a worthless check), with two charges (for another sexual assault and a worthless-check offense) dismissed and read in. *Straszkowski*, 310 Wis. 2d 259, ¶¶ 10-15. After sentencing, the defendant moved to withdraw his guilty pleas, "contend[ing] that his plea was not knowing and intelligent because he was unaware that a charge dismissed but read in under a plea agreement is deemed admitted for purposes of sentencing the defendant on the charge to which the defendant pled guilty." *Id.* ¶ 2. This court declared that "an admission of guilt is not required by our read-in procedure and that the circuit court

should avoid the terminology 'admit' or 'deemed admitted' in referring to or explaining a read-in charge for sentencing purposes except when a defendant does admit the read-in charge." *Id.* ¶ 6.

This court declared that Straszkowski's argument that his plea was not entered knowingly and intelligently because he was unaware that the circuit court would deem the read-in sexual assault charge to be admitted for sentencing purposes "is unconvincing": the record showed that neither the State, defense counsel, nor the circuit court ever referred to the read-in charges as admitted or deemed admitted. *Id.* ¶¶ 32-40. Because the circuit court never considered the read-in charge admitted for sentencing purposes, the defendant failed to show that his plea was not knowingly entered. *Id.* ¶ 56.

Further, this court "withdr[ew] language in the case law that may be read as intimating that when a charge is read in a defendant must admit or is deemed to admit the read-in charge for sentencing purposes." *Id.* ¶ 95. "[N]o admission of guilt from a defendant for sentencing purposes is required (or should be deemed) for a read-in charge to be considered for sentencing purposes and to be dismissed." *Id*. ¶ 97.

In *Frey*, the central issue was whether the sentencing court could consider charges that were dismissed outright as a part of a plea agreement in imposing a sentence. *Frey*, 343 Wis. 2d 358 ¶ 40. After holding that the dismissed charges could be considered, this court "clarifi[ed] how the read-in procedure and dismissed charges fit into the plea bargaining process," and examined case law discussing the read-in procedure. *Id.* ¶¶ 55, 61-79. In particular, this court held that

> when the State and a defendant agree that charges will be read in, those charges are expected to be considered in sentencing, *State v. Floyd*, 2000 WI 14, ¶ 27, 232 Wis. 2d 767, 606 N.W.2d 155, with the understanding that the read-in

> charges could increase the sentence up to the maximum that the defendant could receive for the conviction in exchange for the promise not to prosecute those additional offenses.

Id. ¶ 68.

In order to obtain this substantial benefit of avoiding prosecution for the read-in charges in the future, "the defendant exposes himself to the likelihood of a higher sentence within the sentencing range and the additional possibility of restitution for the offenses that are 'read-in.'" *Id*. ¶ 73. Therefore,

> [b]oth parties may receive benefits from a read-in at sentencing and may negotiate such a procedure either as a part of the plea bargain or as part of sentencing. Also, both parties give something up by accepting a read-in procedure – the State agrees not to prosecute other crimes and a defendant risks greater restitution **and a higher sentence**.

Id. ¶ 74 (emphasis added).

B. Applicability of *Straszkowski* and *Frey* to the issues in this case.

Straszkowski held that a guilty plea was not rendered involuntary by the trial court's failure to inform a defendant that read-in charges would be considered for purposes of sentencing and that a read-in charge is not an admission of guilt. *Straszkowski*, 310 Wis. 2d 259, ¶¶ 32-40. *Frey* clarified that "when the State and a defendant agree that charges will be read in, those charges are expected to be considered in sentencing … with the understanding that the read-in charges could increase the sentence up to the maximum that the defendant could receive for the conviction in exchange of the promise not to prosecute those additional offenses." *Frey*, 343 Wis. 2d 358, ¶ 68.

Contrary to this precedent, the court of appeals in this case held that Sulla's statements in his affidavit – that his attorney told him that "'agreeing to the read-in offense of arson was not admitting guilt and that it was just something the Court would "look at" at sentencing'" and that "'if [he] had known that it was going to be considered as a negative at [his] sentencing [he] would not have entered the no-contest plea'" (Slip op. ¶ 3; Pet-Ap. 104) – were sufficient to order a hearing. The court of appeals focused on what it described as "the ambiguity in the word 'guilt' as used in the alleged statement by counsel" and the "potential for confusion that is inherent in the read-in concept" (Slip op. ¶ 15; Pet-Ap. 107-08). Fundamentally, the court of appeals' decision, asserting that Sulla's counsel's use of the word "guilt" to explain to Sulla that by agreeing to have the arson charge read in he was "not admitting guilt" was "confusing" and accepting Sulla's argument that he did not understand that the read-in charge would negatively affect his sentence, directly contradicts this court's decisions in *Straszkowski* and *Frey*.

As set forth in Sulla's affidavit, Sulla's attorney's statement to Sulla that Sulla was not "admitting guilt" by agreeing to have the arson offense read in as part of his plea agreement is an accurate statement of the law and cannot be the basis for Sulla to claim his plea was entered into "unknowingly." By holding that this statement that he was not "admitting guilt" was confusing, citing "the potential for confusion inherent in the read-in concept," the court of appeals committed fundamental reversible error because, as a matter of law under *Straszkowski*, a defendant agreeing to a read-in charge is not admitting guilt to that charge. Therefore, the fact that his attorney told him correctly that he was not admitting guilt is insufficient to entitle Sulla to an evidentiary hearing on his plea-withdrawal motion.

In addition, while it remains true under *Straszkowski* that a read-in charge is not an admission of guilt, this court in its examination of the plea bargaining process in *Frey* recognized that the bargained-for agreement involving dismissed and read-in charges results in both the State and the defendant receiving benefits in exchange for giving something up. This court noted the trade-off that results from dismissing and reading in a charge as part of a plea agreement:

> The promise by the prosecutor not to prosecute the read-in charges in the future is an essential component to a read-in. This bar to future prosecution is protected by due process.
>
> In exchange for this benefit, **the defendant exposes himself to the likelihood of a higher sentence within the sentencing range and the additional possibility of restitution for the offenses that are "read-in."** Wisconsin Stat. § 973.20 requires that the sentencing judge order partial or full restitution for the crime of which a defendant was convicted and *for any read-in crime. See also Straszkowski*, 310 Wis. 2d 259, ¶¶ 81-87, 750 N.W. 2d 835.
>
> Both parties may receive benefits from a read-in at sentencing and may negotiate such a procedure either as a part of a plea bargain or as part of sentencing. Also, both parties give something up by accepting a read-in procedure **– the State agrees not to prosecute other crimes and a defendant risks greater restitution and a higher sentence**.

Frey, 343 Wis. 2d 358, ¶¶ 72-74 (emphases added, citations omitted).

In this case, the circuit court explained to Sulla that read-in charges would be considered in ordering restitution and ordered that he pay restitution as part of his sentence (66:51, 54). Sulla's statement in his affidavit that he was unaware that the read-in charge would be "considered a negative" is belied by the fact that in this case, the read-in charge was considered in the restitution order.

Further, this court in *Frey*, citing *Straszkowski* and its comprehensive discussion of the read-in procedure, held that "when the State and a defendant agree that charges will be read in, those charges are expected to be considered in sentencing … with the understanding that the read-in charges could increase the sentence up to the maximum that the defendant could receive for the conviction in exchange for the promise not to prosecute those additional offenses." *Frey*, 343 Wis. 2d 358, ¶¶ 63, 68. Therefore, under *Straszkowski* and *Frey*, Sulla could not reasonably believe that he was admitting guilt to the read-in charge, or that the read-in charge would be either a neutral or positive factor at sentencing, rather than a negative factor, because a read-in charge, while not an admission of guilt, "exposes [the defendant] to the likelihood of a higher sentence" and the possibility of restitution. *Frey,* 343 Wis. 2d 358, ¶ 73. This is a fundamental part of the plea-bargaining process: by receiving the benefit of having a charge dismissed, the defendant agrees to have the dismissed but read-in charge considered at sentencing and thus faces a higher sentence, up to the maximum for the convictions. The court of appeals committed an error of law when it held, in direct contradiction to this supreme court precedent, that these statements in Sulla's affidavit were facts that, if true, would entitle him to withdraw his plea.

CONCLUSION

The record is clear that Sulla entered no-contest pleas to two counts of burglaries. By terms of the plea agreement, the arson offense was dismissed and read in for purposes of being considered at sentencing and for ordering restitution. Both Sulla's attorney and the circuit court accurately explained that Sulla was not admitting guilt to the arson charge but that the read-in offense would be considered at sentencing. The circuit court properly denied Sulla's postconviction motion for plea withdrawal, finding that he had not alleged sufficient facts to entitle him to relief. Sulla's assertions – that his attorney told him he was not admitting guilt and that the arson read-in charge was something the court would consider at sentencing, and that if he had known it would be considered a negative at sentencing he would not have entered his plea – failed to allege sufficient, true facts entitling him to relief. Further, the circuit court properly exercised its discretion based on the record as a whole to deny an evidentiary hearing.

The court of appeals, by broadly expanding *Bentley*, ignoring *Straszkowski* and *Frey*, and not supporting its decision with any other case law, committed fundamental error in remanding the case for an evidentiary hearing on Sulla's plea withdrawal motion based on Sulla's mere claim that he did not understand that the read-in offense of arson would have a negative effect on his sentence. This court should reverse the court of appeals' decision remanding the case for an evidentiary hearing on Sulla's plea withdrawal motion, and affirm the court of appeals' denial of Sulla's claims of judicial bias and abuse of sentencing discretion.

Dated this 14th day of October, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,071 words.

Dated this 14th day of October, 2015.

_____
Anne C. Murphy
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 14th day of October, 2015.

_____
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